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SUPREME COURT JUL 14 2009

State of North Dakota

JOINT PROCEDURE COMMITTEE

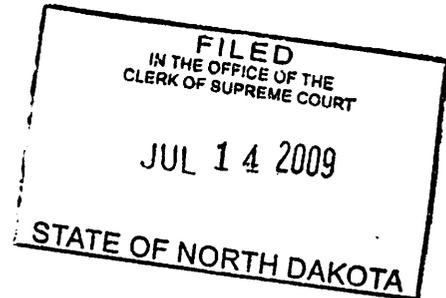
July 14, 2009

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FIRST FLOOR JUDICIAL WING  
600 E BOULEVARD AVE DEPT 180  
BISMARCK, ND 58505-0530

CHAIR  
JUSTICE MARY MUEHLEN MARING  
STAFF ATTORNEY  
MICHAEL J. HAGBURG

Honorable Gerald W. VandeWalle, Chief Justice  
North Dakota Supreme Court  
600 East Boulevard Avenue  
Bismarck, ND 58505-0530



Re: Proposed Amendments to N.D.R.Crim.P. 5

Dear Chief Justice:

The Joint Procedure Committee took up N.D.R.Crim.P. 5 (Initial Appearance Before the Magistrate) at its May 21-22, 2009, meeting. The Committee addressed this rule in response to H.B. 1288, which amended North Dakota's statutes relating to the uniform complaint and summons. The effect of the statutory amendments was to expand the use of the uniform complaint and summons while also requiring that its use comply with the Rules of Criminal Procedure. A copy of H.B. 1288 is attached.

McLean County State's Attorney Ladd Erickson attended the Committee's May meeting to explain the intent and substance of the statutory amendments. He also provided the Committee with a suggested draft amendment to N.D.R.Crim.P. 5. The Committee discussed the statutory amendments and ultimately approved a proposed amendment to N.D.R.Crim.P. 5 consistent with Mr. Erickson's suggestions. An excerpt from the draft minutes of the meeting is attached to provide the Court with information on the Committee's discussion.

The proposed amendments to N.D.R.Crim.P. 5 are attached. Because the statutory amendments take effect January 1, 2010, the Committee requests the Court consider the proposed amendments to N.D.R.Crim.P. 5 in an expedited manner under N.D.R.Proc.R. § 6.

Sincerely,

Mary Muehlen Maring  
Chair, Joint Procedure Committee

MH:kh  
attachment

**RULE 5. INITIAL APPEARANCE BEFORE THE MAGISTRATE**

**(a) General.**

**(1) Appearance upon an arrest. An officer or other person making an arrest must take the arrested person without unnecessary delay before the nearest available magistrate.**

**(2) Arrest Without a Warrant. If an arrest is made without a warrant, the magistrate must promptly determine whether probable cause exists under Rule 4(a). If probable cause exists to believe that the arrested person has committed a criminal offense, a complaint must be filed in the county where the offense was allegedly committed. A copy of the complaint must be given within a reasonable time to the arrested person and to any magistrate before whom the arrested person is brought, if other than the magistrate with whom the complaint is filed.**

**(b) Statement by the magistrate at the initial appearance.**

**(1) In all cases. The magistrate must inform the defendant of the following:**

**(A) the charge against the defendant and any accompanying affidavit;**

**(B) the defendant's right to remain silent; that any statement made by the defendant may later be used against the defendant;**

**(C) the defendant's right to the assistance of counsel before making any statement or answering any questions;**

**(D) the defendant's right to be represented by counsel at each and every stage of the proceedings;**

22 (E) if the offense charged is one for which counsel is required, the defendant's right  
23 to have legal services provided at public expense to the extent that the defendant is unable  
24 to pay for the defendant's own defense without undue hardship; and

25 (F) the defendant's right to be admitted to bail under Rule 46.

26 (2) Felonies. If the defendant is charged with a felony, the magistrate must inform the  
27 defendant also of the defendant's right to a preliminary examination and the defendant's right  
28 to the assistance of counsel at the preliminary examination.

29 (3) Misdemeanors. If the defendant is charged with a misdemeanor, the magistrate  
30 must inform the defendant also of the defendant's right to trial by jury in all cases as provided  
31 by law and of the defendant's right to appear and defend in person or by counsel.

32 (c) Right to preliminary examination.

33 (1) Waiver.

34 (A) If the offense charged is a felony, the defendant has the right to a preliminary  
35 examination. The defendant may waive the right to preliminary examination at the initial  
36 appearance if assisted by counsel.

37 (B) If the defendant is assisted by counsel and waives preliminary examination and  
38 the magistrate is a judge of the district court, the defendant may be permitted to plead to the  
39 offense charged in the complaint at the initial appearance.

40 (C) If the defendant waives preliminary examination and does not plead at the initial  
41 appearance, an arraignment must be scheduled.

42 (D) The magistrate must admit the defendant to bail under the provisions of Rule 46.

43 (2) Non-waiver. If the defendant does not waive preliminary examination, the  
44 defendant may not be called upon to plead to a felony offense at the initial appearance. A  
45 magistrate of the county in which the offense was allegedly committed must conduct the  
46 preliminary examination. The magistrate must admit the defendant to bail under the  
47 provisions of Rule 46.

48 (d) Interactive television. Interactive television may be used to conduct an appearance  
49 under this rule as permitted by N.D. Sup. Ct. Admin. R 52.

50 (e) Uniform Complaint and Summons. Notwithstanding Rule 5(a), a uniform  
51 complaint and summons may be used in lieu of a complaint and appearance before a  
52 magistrate, whether an arrest is made or not, for an offense that occurs in an officer's  
53 presence or for a motor vehicle or game and fish offense. When a uniform complaint and  
54 summons is issued for a felony offense, other than a felony proscribed in the motor vehicle  
55 title, the prosecuting attorney must also subsequently file a complaint that complies with Rule  
56 5(a). In any circumstance where an individual is held in custody they must be brought before  
57 a magistrate for an initial appearance without unnecessary delay.

#### 58 EXPLANATORY NOTE

59 Rule 5 was amended effective March 1, 1990; January 1, 1995; March 1, 2006; June  
60 1, 2006; \_\_\_\_\_.

61 Rule 5 is derived from Fed.R.Crim.P. 5. Rule 5 is designed to advise the defendant  
62 of the charge against the defendant and to inform the defendant of the defendant's rights. This  
63 procedure differs from arraignment under Rule 10 in that the defendant is not called upon to

64 plead.

65 Subdivision (a) provides that an arrested person must be taken before the magistrate  
66 "without unnecessary delay." Unnecessary delay in bringing a person before a magistrate is  
67 one factor in the totality of circumstances to be considered in determining whether  
68 incriminating evidence obtained from the accused was given voluntarily.

69 Subdivision (a) was amended, effective January 1, 1995, to clarify that a "prompt"  
70 judicial determination of probable cause is required in warrantless arrest cases.

71 Subdivision (b) is designed to carry into effect the holding of *Miranda v. Arizona*, 384  
72 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966). Because the *Miranda*  
73 rule is constitutionally based, it applies to all officers whether state or federal. One should  
74 note that the protections required by *Miranda* apply as soon as a person "has been taken into  
75 custody or otherwise deprived of his freedom of action in any significant way", while the  
76 requirement that an accused be taken before a magistrate is applicable only to an "arrested  
77 person". The *Miranda* decision is based upon the Fifth Amendment privilege against self-  
78 incrimination and holds that no statement obtained by interrogation of a person in custody  
79 is admissible, unless, before the interrogation begins, the accused has been effectively  
80 warned of the accused's rights, including the right not to answer questions and the right to  
81 have counsel present.

82 Subdivision (b) specifies the action which must be taken by the magistrate.  
83 Subparagraphs (b)(1)(A), (b)(1)(B), and (b)(1)(C) are stated by *Miranda* to be absolute  
84 prerequisites to interrogation and cannot be dispensed with on even the strongest showing

85 that the person in custody was aware of those rights.

86 Paragraph (b)(1) was amended, effective June 1, 2006, to remove a reference to court  
87 appointment of counsel for indigents. Courts ceased appointing counsel for indigents on  
88 January 1, 2006, when the North Dakota Commission on Legal Counsel for Indigents became  
89 responsible for defense of indigents.

90 Paragraph (b)(2) provides an additional requirement to the instructions given by the  
91 magistrate in paragraph (b)(1) when the charge is a felony. It requires the magistrate to  
92 inform the defendant of the right to a preliminary examination. The Sixth Amendment right  
93 to counsel applies to a preliminary examination granted under state law because the  
94 preliminary examination is a critical stage of the state's criminal process.

95 Subdivisions (b) and (c) were amended, effective March 1, 1990. The amendments  
96 track the 1987 amendments to Fed.R.Crim.P. 5, which are technical in nature, and no  
97 substantive change is intended.

98 Subdivision (c) was amended, effective January 1, 1995, in response to elimination  
99 of county courts and to ensure that a defendant is not called upon to waive the preliminary  
100 examination or to plead without the assistance of counsel at the initial appearance.

101 Subdivision (d) was amended, effective March 1, 2004, to permit the use of interactive  
102 television to conduct initial proceedings. Subdivision (d) was amended, effective March 1,  
103 2006, to reference N.D.Sup.Ct.Admin.R. 52, which governs proceedings conducted by  
104 interactive television.

105 Subdivision (e) was added, effective \_\_\_\_\_, to provide a procedure for

106 using the uniform complaint and summons. Statutory provisions governing the uniform  
107 complaint and summons, which is commonly referred to as the “uniform citation,” are in  
108 N.D.C.C. §§ 20.1-12-14.1 and 29-05-31.

109 Rule 5 was amended, effective March 1, 2006, in response to the December 1, 2002,  
110 revision of the Federal Rules of Criminal Procedure. The language and organization of the  
111 rule were changed to make the rule more easily understood and to make style and  
112 terminology consistent throughout the rules.

113 Sources: Joint Procedure Committee Minutes of \_\_\_\_\_; April 27-  
114 28, 2006, pages 2-5, 15-17; January 29-30, 2004, pages 22-23; September 26-27, 2002, pages  
115 12-13; January 27-28, 1994, pages 3-5; September 23-24, 1993, pages 4-7; April 20, 1989,  
116 page 4; December 3, 1987, page 15; February 22-23, 1973, page 18; March 23-24, 1972,  
117 pages 2-3, 11-12; January 27, 1972, pages 17-22; November 21-22, 1969, pages 2, 8-9, 17-  
118 19; May 3-4, 1968, pages 1-2; January 26-27, 1968, pages 7-9.

119 Statutes Affected:

120 Superseded: N.D.C.C. §§ 29-05-04, 29-05-11, 29-05-17, 29-05-19, 29-07-01, 29-07-  
121 02, 29-07-04, 29-07-05, 29-07-07, 29-07-08, 29-07-09, 29-07-10, 33-12-07, 33-12-09.

122 Considered: N.D.C.C. §§ 20.1-12-14.1, 29-05-31, 29-07-03, 29-07-06, 40-18-15, 40-  
123 18-16, 40-18-18.

124 Cross Reference: N.D.R.Crim.P. 5.1 (Preliminary Examination); N.D.R.Crim.P. 10  
125 (Arraignment); N.D.R.Crim.P. 35 (Correcting or Reducing a Sentence); N.D.R.Crim.P. 43  
126 (Defendant's Presence); N.D.R.Crim.P. 44 (Right to and Assignment of Counsel); N.D. Sup.



**Sixty-first Legislative Assembly of North Dakota  
In Regular Session Commencing Tuesday, January 6, 2009**

HOUSE BILL NO. 1288  
(Representative DeKrey)

AN ACT to amend and reenact sections 12.1-08-11, 20.1-02-14.1, and 29-05-31 and subsection 5 of section 39-06.1-03 of the North Dakota Century Code, relating to complaint and summons procedures and administrative hearing appeals; and to provide an effective date.

**BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

**SECTION 1. AMENDMENT.** Section 12.1-08-11 of the North Dakota Century Code is amended and reenacted as follows:

**12.1-08-11. ~~Fleeing a peace officer~~ Refusing to halt.** Any person, other than the driver of a motor vehicle under section 39-10-71, who willfully fails or refuses to stop or who otherwise flees or attempts to elude, in any manner, a pursuing peace officer, when given a visual or audible signal to stop, is guilty of a class B misdemeanor for a first or second offense and a class A misdemeanor for a subsequent offense. A signal to stop complies with this section if the signal is perceptible to the person and:

1. If given from a vehicle, the signal is given by hand, voice, emergency light, or siren, and the vehicle is appropriately marked showing it to be an official law enforcement vehicle; or
2. If not given from a vehicle, the signal is given by hand, voice, emergency light, or siren, and the officer is in uniform and prominently displays the officer's badge of office.

**SECTION 2. AMENDMENT.** Section 20.1-02-14.1 of the North Dakota Century Code is amended and reenacted as follows:

**20.1-02-14.1. Uniform complaint and summons - Promise to appear - Penalty.**

1. There is ~~hereby~~ established a uniform complaint and summons that may be used in cases involving violations of this title or other violations of a state law which occur on property that the department owns, leases, or manages or on sovereign lands as defined by section 61-33-01. Whenever the complaint and summons established by this section is used, the provisions of the North Dakota Rules of Criminal Procedure ~~relating to arrests without warrants do not apply, and the magistrates or state's attorneys are not required to make another complaint of the offense charged in the uniform complaint and summons~~ apply. The uniform complaint and summons must be of a form prescribed by the director and approved by the attorney general.
2. The time of court appearance to be specified in the summons must be at least five days after the issuance of the summons unless the defendant demands an earlier hearing.
3. Upon receipt from the defendant of written promise to appear at the time and place specified in the summons, the defendant must be released from custody. After signing a promise to appear, the defendant must be given a copy of the uniform complaint and summons. Any person refusing to give a written promise to appear may be arrested if proper cause exists, or proceeded against by complaint and warrant of arrest as provided in the North Dakota Rules of Criminal Procedure. ~~Defendant's failure to appear at the time and place designated after signing a promise to appear is a class B misdemeanor.~~

~~The uniform summons and complaint may not be used if the officer, acting within the officer's discretion, has reason to believe the defendant will not be subject to arrest upon a warrant issued by a~~



**DARKNESS**

\_\_\_\_\_ Night \_\_\_\_\_ Fog \_\_\_\_\_ Snow

**OTHER TRAFFIC PRESENT**

\_\_\_\_\_ Cross \_\_\_\_\_ Oncoming \_\_\_\_\_ Pedestrian \_\_\_\_\_ Same direction

**IN ACCIDENT**

\_\_\_\_\_ Ped. \_\_\_\_\_ Vehicle \_\_\_\_\_ Intersection  
\_\_\_\_\_ Right angle \_\_\_\_\_ Head on \_\_\_\_\_ Rear end  
\_\_\_\_\_ Ran off road \_\_\_\_\_ Other

Area: \_\_\_\_\_ School \_\_\_\_\_ Rural \_\_\_\_\_ Business

\_\_\_\_\_ Industrial \_\_\_\_\_ Residential  
Highway: \_\_\_\_\_ 2 Lane \_\_\_\_\_ 4 Lane \_\_\_\_\_ 4 Lane Divided

Type \_\_\_\_\_ Gravel \_\_\_\_\_ Dirt

**OFFENSE CONTRIBUTED MATERIALLY TO ACCIDENT**

\_\_\_\_\_ Yes \_\_\_\_\_ No

**THE STATE OF NORTH DAKOTA TO THE ABOVE-NAMED DEFENDANT  
(CITY ORDINANCE OR STATE CRIMINAL TRAFFIC VIOLATION)**

You are summoned to appear at the time and place designated below to answer to the charge made against you.

\_\_\_\_\_

**Appearance**

Before: Municipal Judge District Ct. \_\_\_\_\_ A.M./P.M.

Location      Month      Day      Year      Time

Dated \_\_\_\_\_, \_\_\_\_\_  
Officer \_\_\_\_\_

**PROMISE TO APPEAR**

I consent and promise to appear at the time and place specified in the above summons, the receipt of a copy of which is acknowledged, and I expressly waive earlier hearing.

Dated \_\_\_\_\_, \_\_\_\_\_  
Defendant \_\_\_\_\_

**(STATE NONCRIMINAL TRAFFIC VIOLATION)**

You are notified of your right to request, within fourteen days of the date of this citation, a hearing concerning the alleged traffic violation. If you do not request a hearing, the bond is deemed forfeited and the violation admitted. If you are requesting a hearing, date and sign the following portion of this citation AND INCLUDE THE BOND NOTED ON THIS CITATION for the alleged violation. Failure to do so may result in the suspension of your operator's license. You will be notified of the hearing date by the court for the county in which this citation was issued.

**REQUEST FOR HEARING**

I submit the designated bond and request a hearing on the alleged traffic violation and promise to appear at the time and date specified in the summons issued by the court for the county in which the citation was issued.

Dated \_\_\_\_\_, \_\_\_\_\_  
Defendant \_\_\_\_\_

**SECTION 4. AMENDMENT.** Subsection 5 of section 39-06.1-03 of the North Dakota Century Code is amended and reenacted as follows:

5. a. A person may not appeal a finding from a district judge or magistrate that the person committed the violation. If a person is aggrieved by a finding in the municipal court that the person committed the violation, the person may, without payment of a filing fee, appeal that finding to the district court for trial anew. If, after trial in the appellate court, the person is again found to have committed the violation, there may be no further appeal. Notice of appeal under this subsection must be given within thirty days after a finding of commission of a violation is entered by the official. Oral notice of appeal may be given to the official at the time that the official adjudges that a violation has been committed. Otherwise, notice of appeal must be in writing and filed with the official, and a copy of the notice must be served upon the prosecuting attorney. An appeal taken under this subsection may not operate to stay the reporting requirement of subsection 4, nor to stay appropriate action by the licensing authority upon receipt of that report.

b. The appellate court upon application by the appellant may:

- (1) Order a stay of any action by the licensing authority during pendency of the appeal, but not to exceed a period of one hundred twenty days;
- (2) Order a stay and that the appellant be issued a temporary restricted driving certificate by the licensing authority to be effective for no more than one hundred twenty days; or
- (3) Deny the application.

An application for a stay or temporary certificate under this subdivision must be accompanied by a certified copy of the appellant's driving record, for the furnishing of which the licensing authority may charge a fee of three dollars. Any order granting a stay or a temporary certificate must be forwarded forthwith by the clerk of court to the licensing authority, which immediately shall issue a temporary certificate in accordance with the order in the manner provided by law. A court may not make a determination on an application under this subdivision without notice to the appropriate prosecuting attorney. A person who violates or exceeds the restrictions contained in any temporary restricted driving certificate issued pursuant to this subdivision is guilty of a traffic violation and must be assessed a fee of twenty dollars.

c. If the person charged is found not to have committed the violation by the appellate court, the clerk of court shall report that fact to the licensing authority immediately. If Unless the appropriate state's attorney consents to prosecute the appeal, if an appeal under this subsection is from a violation of a city ordinance, the city attorney for the city wherein the alleged violation occurred shall prosecute the appeal. In all other cases, the appropriate state's attorney shall prosecute the appeal.

**SECTION 5. EFFECTIVE DATE.** This Act becomes effective on January 1, 2010.

\_\_\_\_\_  
Speaker of the House

\_\_\_\_\_  
President of the Senate

\_\_\_\_\_  
Chief Clerk of the House

\_\_\_\_\_  
Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Sixty-first Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1288.

House Vote:      Yeas    92      Nays    0      Absent    2

Senate Vote:    Yeas    45      Nays    0      Absent    2

\_\_\_\_\_  
Chief Clerk of the House

Received by the Governor at \_\_\_\_\_ M. on \_\_\_\_\_, 2009.

Approved at \_\_\_\_\_ M. on \_\_\_\_\_, 2009.

\_\_\_\_\_  
Governor

Filed in this office this \_\_\_\_\_ day of \_\_\_\_\_, 2009,  
at \_\_\_\_\_ o'clock \_\_\_\_\_ M.

\_\_\_\_\_  
Secretary of State

EXCERPT FROM DRAFT MINUTES

Joint Procedure Committee  
May 21-22, 2009

RULE 5, N.D.R.Crim.P., INITIAL APPEARANCE BEFORE THE MAGISTRATE (PAGES 36-63 OF THE AGENDA MATERIAL)

The Chair welcomed Mr. Ladd Erickson, McLean County States Attorney, to explain newly passed legislation on the uniform complaint and summons and the legislation's potential impact on criminal procedure in North Dakota.

Mr. Erickson said that the State's Attorneys Association sought cost saving and increased efficiency in developing the statutory amendments. The three components of HB 1280 reflect these factors: eliminating speeding ticket appeals, renaming "fleeing on foot" so that it would not be confused with vehicular fleeing, and reworking the uniform complaint and summons, more popularly know as the uniform traffic citation.

Mr. Erickson said the State's Attorneys concluded that the existing uniform citation statutes were unconstitutional because the statutes claimed that the court rules did not apply to uniform citations. The State's Attorneys contacted the Chief Justice so that there could be coordination with the judicial branch on rule changes consistent with the planned statutory changes, and they provided drafts of the statutory changes. The Committee reviewed these drafts at its January 2009 meeting.

Mr. Erickson indicated that the statutory changes have now been passed by the legislature. Mr. Erickson also said that he had reviewed the minutes of the Committee's discussion of the changes and he observed that the Committee has focused on "worst case" scenarios in its discussion. Mr. Erickson told the Committee that the State's Attorneys also recognize these "worst case" possibilities.

Mr. Erickson said that people end up in jail and do not get expedient bond hearings, and they go to court to find there is no complaint in the file. Mr. Erickson said that State's Attorneys and the counties were working to resolve these problems, including developing a uniform computer system for criminal complaints.

Mr. Erickson said that, when a long form complaint is necessary, law enforcement and prosecutors are required to do a substantial amount of work in gathering information and drafting documents. He said that, in some counties, if the defendant is brought in on a

variety of charges, the defendant may have to have two initial appearances before the court: one on a uniform traffic citation and a later appearance on a long form complaint. Mr. Erickson said it was wasteful to have two court hearings and two court files in such a case.

Mr. Erickson said that bond hearings were another issue. He said that, prior to a bond hearing, law enforcement, the prosecutor and the defendant all need to communicate and coordinate to be prepared for the hearing. Mr. Erickson said that the Highway Patrol was using a computer system that has increased efficiency in preparing for bond hearings and that prosecutors were also developing a computerized system. Mr. Erickson said the systems were designed to cut out administrative delays in bond hearings.

Mr. Erickson said that the statutory amendments were designed to increase efficiency in handling defendants. He said that effective January 1, 2010, uniform citations can be used for all misdemeanors and the Rules of Criminal Procedure will apply. He said, however, that judges will need to start doing probable cause hearings and prosecutors will have to prepare long form complaints on such offenses as driving under the influence, driving without insurance, and driving under suspension if Rule 5 is not modified to reflect the amended statutes on uniform citations.

Mr. Erickson distributed a proposed amendment to Rule 5. The amendment would add a new subdivision to the rule:

(e) Uniform Citations. Notwithstanding Rule 5(a), a uniform citation may be used in lieu of a complaint and appearance before a magistrate, whether an arrest is made or not, for an offense that occurs in an officer's presence or for a motor vehicle or game and fish offense. When a uniform citation is issued for a felony offense, other than a felony proscribed in the motor vehicle title, the prosecuting attorney shall also subsequently file a complaint that complies with subsection (a), and in any circumstance where an individual is held in custody they must be brought before a magistrate for an initial appearance without unnecessary delay.

Mr. Erickson said that, under the proposed amendment, if a misdemeanor offense occurs in an officer's presence, the officer can issue a citation. He said a long form complaint or probable cause hearing would not be required in such a case when a citation was issued. He said that probably 95 percent of the cases in which a citation would be issued for a non-traffic offense misdemeanor would involve possession of drug paraphernalia or a minor in possession of alcohol. He said that in such cases, the defense is generally constructive possession and that this sort of defense could not be pulled out of a law enforcement affidavit by a prosecutor but would need to be presented by defense counsel. For this reason, he said, using a citation to charge the individual would be cost-effective and save the law enforcement and court resources that otherwise would be expended in preparing

affidavits and long form complaints.

Mr. Erickson said that, under the proposed amendment to Rule 5, prosecutors would still need to do long form complaints on felonies outside of N.D.C.C. Title 39. He said that the felony defendants would come to a preliminary examination and be charged in an information. He reminded the Committee that law enforcement officers can arrest persons accused of a felony and hold them for up to 48 hours under existing law. He said that the language of the proposed amendment was designed to ensure that if a person was brought in on a felony charge under a citation, a long form complaint would be prepared and the probable cause process would begin immediately.

A member asked how the process of handling a defendant brought in on a citation would occur. The member asked, for example, what would happen if a person was stopped on a traffic offense and the officer found a huge bag of drugs in the car. The member said this likely could be charged as felony drug possession with intent to deliver. The member asked whether the charging process would be started out with a traffic citation and another citation for the drugs.

Mr. Erickson said an officer initially could put both the traffic and drug offense on a citation, but that under law and under the language of the proposed amendment, a probable cause hearing and a long form complaint would be required for the drug offense. Mr. Erickson said the officer could also just arrest the defendant for the drugs. He said that regardless of whether the officer used a citation or just arrested the defendant, there would need to be a probable cause hearing. Mr. Erickson said the charging document would be the initial complaint, not the citation.

A member said the statute referred to the citation as a “uniform complaint and summons.” The member said the summons did not set the bond. The member asked if what was being contemplated under the statutory language and the rule text was that the officer would issue a summons telling the defendant to appear at a certain date.

Mr. Erickson said that the officer could do a cite and release, a court date would be set on the summons part of the citation. He said if the person was taken into custody, there would be a bond schedule and the person could bond out. He said if the person could not bond out under the schedule, a bond hearing would take place.

A member said the uniform citation statute seemed only to give authority for officers to do a cite and release. The member said the statute did not mention a bond schedule. The member said that there is a statute that authorizes a bond schedule for traffic offenses, but not for other offenses. The member said there are only very limited situations where bond

could be set by schedule.

Mr. Erickson said that the judicial districts have put together bond schedules of their own. He said that if a defendant cannot post bond according to the schedule, they will get an initial appearance and bond can be considered at that time.

A member said a probable cause determination must be made on a warrantless misdemeanor arrest within 48 hours. Mr. Erickson responded that, under the proposed amendment to Rule 5, the probable cause determination would not be necessary if a person was arrested under a uniform citation and was not in custody. A member said, as a practical matter, current practice is that if an arrested person does not post bond under whatever bail schedule is in place, there is a probable cause hearing within 48 hours.

A member said the statutory form for the uniform complaint and summons contained a promise to appear but did not mention bond. Mr. Erickson said that for misdemeanor offenses, a person arrested under a uniform complaint would be released if they could make bond under the bond schedule. A member said that, depending on the district where the arrest took place, the bond schedules covered most misdemeanor offenses.

A member said if a person is arrested under a citation containing both misdemeanor and felony charges, the person would not be able to post bond because there is no bond schedule for felony offenses. Mr. Erickson said that under the proposed amendment, a long form complaint would have to be prepared and a bond hearing held before the person would be allowed to bond out.

A member said that N.D.C.C. 29-08-02 only authorizes delegation of bail authority in the case of traffic violations. The member said a bond schedule that includes offenses other than traffic offenses is not a valid bond schedule. A member replied that an argument could be made that if a bond schedule is approved by the district court, the schedule is not a delegation of bond authority but the establishment of a preset bond amount for a given offense. A member asked how a court could preset a bond on someone they had never seen.

Mr. Erickson said that the bond schedule benefits the defendant, it does not benefit the state. He said a defendant does not have to sit in jail at all if he or she can meet the bond amount set by the schedule. A member replied that the statute does not authorize this.

A member said that the bond schedules that are currently in use provide a dollar amount to bond out for a given offense. The member said if the courts are dissatisfied with this, they could change the bond schedule to provide that only a summons to appear is needed for a given offense. The member said that if a person is taken into custody, there needs to

be either a bond schedule or the opportunity for an appearance in court so no one is left sitting in jail.

Mr. Erickson said that if the Committee was concerned about the use of bond schedules when people are arrested under uniform citations, the Committee could deal with that through N.D.R.Crim.P. 46, the bail rule. He said that the amendments to the uniform citation statutes were written so that the Rules of Criminal Procedure would apply to the handling of citations.

A member said it was unlikely that any defense attorney would argue to the court that a client should not be released immediately under the bond schedule. A member replied that the appropriate alternative was to release the defendant with a summons to appear and to hold a bond hearing as part of the appearance.

Mr. Erickson said if the summons and bond hearing approach is taken, then amendment of the uniform citation statutes would have been futile because defendants would end up making multiple appearances, which is an inefficiency the amendments were designed to deal with.

A member said the statutory amendments greatly expanded the scope of uniform citation statute, including allowing the citations to be used for felonies. A member said some courts had already been working to resolve inefficiencies in the system through means such as arrest affidavits, a form that an arresting officer signs under oath that contains all the information needed when there is an arrest. The member said that this form gives the court the information it needs to make a probable cause determination and it gives the state's attorney basic information to use in drafting a long form complaint. The member said that, with this information in hand, only one appearance by the defendant is needed.

Mr. Erickson said that while the statutory amendments allow the uniform citation to be used for felonies, the proposed amendment to Rule 5 would limit such use. He said that getting paperwork done timely on charging documents was a concern. A member said the arrest affidavit must be completed immediately after the arrest and eliminates the problem of delayed paperwork.

A member said that one solution being used currently when people are not able to bail out on the bond schedule (or get a bond hearing within 48 hours) is to kick them out of jail after 47 hours, avoiding the 48 hour deadline. A member said that the arrest affidavit approach might help avoid this outcome because state's attorneys would have all the necessary information in hand to finish their probable cause paperwork. A member said the rule could be amended to provide that if a probable cause determination is not completed

within 48 hours, the defendant would be released with a summons to return for a bon hearing.

Mr. Erickson said that the proposed amendment to the rule did not change the requirement that a probable cause determination be made within 48 hours.

Staff reviewed the actions the Committee took relevant to Rule 5 and the amendments to the uniform citation statutes at its last meeting. Staff also discussed the Committee's suggestion that a standard term be used throughout the rules – such as “complaint” or “information” – for the charging document in a criminal case.

Judge McLees MOVED that the Committee recommend amendment of Rule 5 consistent with the proposal submitted by Mr. Erickson. Judge Nelson seconded.

A member said that the terms “complaint” and “information” came from the bifurcated county and district court system that formerly existed in the state. A complaint would be brought before the county court judge and when a defendant was bound over on a felony to district court, the complaint was redrafted as a criminal information. The member said the main functional difference between an information and a complaint was that witnesses needed to be listed on the information.

By unanimous consent, the term “uniform complaint and summons” was substituted for “uniform citation” in the proposed amendment.

A member suggested that the explanatory note indicate that the “uniform complaint and summons” is also called a “uniform citation.” The member suggested that the N.D.C.C. sections referring to the uniform complaint and summons be referenced in the explanatory note. By unanimous consent, staff was instructed to include these references in the explanatory note.

A member said if there is a warrantless arrest, an ex parte probable cause determination must be made within 48 hours. The member said the language of the proposed amendment seemed to gloss over this requirement. Mr. Erickson said under current practice, many warrantless arrests are made without probable cause determinations, especially DUI arrests. A member said that most arrested persons bond out and that the probable cause determination only becomes an issue if the person is detained. A member said that if an arrest affidavit was obtained, doing a probable cause determination would be simplified.

A member said that the terminology “uniform complaint and summons” seemed to indicate that persons arrested would be allowed to be released without posting bond. The member said that a summons instructs a person to report back on a given date. A member

said the statute seemed intended to allow release with a summons to report, rather than an arrest, when the “uniform complaint” is used. The member said that the “uniform summons and complaint” or “uniform citation” was being used as an arrest document.

A member said that last line of the proposed amendment seemed to address the concerns being raised about warrantless arrests, requiring that “in any circumstance where an individual is held in custody they must be brought before a magistrate for an initial appearance without unnecessary delay.” The member said that the 48 hour deadline established by County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), was for probable cause determinations when a person is in custody, not for all probable cause determinations. The member said probable cause would be considered at some point in all cases.

A member said it was not contemplated that a summons (without bond) be issued in every case involving a uniform complaint. The member said there would never be summons issued with no arrest in a DUI case, for example. The member said that the district courts had used their discretion to establish bond schedules for various offenses and use of these bond schedules should continue.

A member said the statute suggested that a summons would be issued in every case that involved a uniform complaint. The member said that law enforcement could always do a warrantless arrest, but in such a case a probable cause determination was required. A member said that the summons referred to in the statute and the proposed rule language was a summons to appear after bond had been posted under the schedule.

The motion CARRIED.

By unanimous consent, the last clause of the amendment language was converted into a separate sentence: “In any circumstance where an individual is held in custody they must be brought before a magistrate for an initial appearance without unnecessary delay.”

A member said that the language of the amendment indicated that some felonies could be charged out by citation. Mr. Erickson said state statutes allowed second offense fleeing in a vehicle and felony DUI to be initially charged by citation. He said these were the only felony offenses that the amendment language applied to, and that an information would still be required on these felonies at the preliminary hearing.

A member asked whether the highway patrol would be issuing summonses on failure to have auto insurance. Mr. Erickson said that the statutes required a 20-day notice before an arrest on a no insurance citation.

Staff advised the Committee that if the proposed amendment to Rule 5 was sent to the Supreme Court as part of the annual rules package, the amendment likely would not take effect until March 1, 2010. Staff said the statutory changes took effect January 1, 2009.

Mr. Mack MOVED that the proposed amendment to N.D.R.Crim.P. 5 be sent to the court on an expedited basis as an emergency measure. Judge Schneider seconded. Motion CARRIED.

The Chair asked whether the Committee wanted to move forward on changing the language throughout the criminal rules to establish a uniform term for the charging document in a criminal case instead of continuing to use “complaint” and “information.”

Mr. Plambeck MOVED to instruct staff to draft proposed changes to the rules using “information” throughout the rules rather than “complaint.” Mr Quick seconded.

A member said that this might be a lot of work for no purpose. The member said that different prosecutors use different documents depending on personal preference and established practice. The member said the amendment language the Committee just adopted used “complaint” because this was the statutory term and that it would not be appropriate to change this particular reference.

A member said that in some districts, prosecutors were entitling documents complaint/information. The member said how a charging document was titled was not greatly important as long as it contained the necessary items. A member said it was not too hard for prosecutors to determine the correct contents for charging documents for misdemeanors and felonies.

The motion FAILED.